SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 445

AVCO CORPORATION,

Petitioner,

v.

AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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The Petitioner, Avco Corporation, respectfully prays that this Court grant rehearing of its decision issued April 8, 1968, affirming a decision of the United States Court of Appeals for the Sixth Circuit.

As its reasons for granting rehearing, the Petitioner states as follows:

1. In footnote 4 of the majority opinion, the Court stated that:

> "Another question raised here is whether the District Court, to which the action had been removed, should have dissolved the injunction issued by the Tennessee

state court. There is, of course, no question of the power of the District Court to dissolve the injunction. See 28 U.S.C. § 1450. *Whether it did so because it felt that action was required by Sinclair Refining Co. v. Atkinson, 370 U.S. 195, or because of its equity powers or both is not clear. But the Court of Appeals went much further and said in a dictum that 'the remedies available in State Courts are limited to the remedies available under Federal law.'* 376 F. 2d, at 343. We reserve decision on *those questions.*" (Emphasis added)

Likewise, the concurring Justices stated that:

"As the Court says, *it is not clear whether or not the District Judge dissolved the injunction 'because it felt that action was required by Sinclair Refining Co. v. Atkinson, 370 U.S. 195,' ante, at ..., n. 4. Accordingly, the Court expressly reserves decision on the effect of Sinclair in the circumstances presented by this case.* The Court will, no doubt, have an opportunity to *reconsider the scope and continuing validity of Sinclair upon an appropriate future occasion.*" (Emphasis added)

It is respectfully submitted that the statement that it is "not clear" whether the District Court dissolved the state court injunction "because it felt that action was required by *Sinclair Refining Co.* v. *Atkinson*" is factually erroneous. A review of the motion to dissolve and the order of the District Court dated March 2, 1966 discloses that it is, in fact, clear that the District Court dissolved the injunction because it felt that such action was required by *Sinclair* and by the Norris-LaGuardia Act of 1932, 47 Stat. 70, 29 U.S.C. 101, et seq. (1964), which *Sinclair* construed and applied. The District Court accepted the Respondents' contention that the state court injunction was invalid and could not be "maintained" after removal. But for Norris-LaGuardia and *Sinclair*, there was no reason to dissolve the injunction and it would not have been dissolved, even

though remand was denied. These facts are evident from the language employed by the District Court in the March 2, 1966 order.

The motion which the District Court granted prayed for dissolution of the state court injunction and dismissal of the case,

> ". . . on the following grounds:
>
> "1. The complaint shows on its face that it involves and grows out of a labor dispute, that the temporary injunction sought and granted enjoins the acts enumerated in 29 U.S.C. § 104, or some of them, and *because this Court is denied the power to issue and maintain such injunctions by the provisions of 29 U.S.C. § 101 and 104.*
>
> "2. Because the complaint shows on its face that it involves and grows out of a labor dispute, *because the temporary injunction issued enjoins acts described in U.S.C. § 104, and because the said temporary injunction, issued by a 'Court of the United States' as defined by 29 U.S.C. § 113(d) is illegal.*" (A. 13; emphasis added)

In the order of March 2, 1966 (A. 17-22), the District Court first denied the Petitioner's motion to remand (A. 14), stating in part as its reasons:

> "*The Norris-LaGuardia Act withdraws jurisdiction from the federal courts to enjoin a peaceful strike growing out of a labor dispute, even when the strike violates the terms of a collective bargaining contract. Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962).* But the mere fact that *a prohibited labor injunction is among the remedies sought* does not mean that a district court lacks original jurisdiction over the cause of action for the purpose of awarding other relief. Thus, in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962), the inclusion in the complaint of a prayer for *a prohibited labor injunction*, together with a prayer for damages, did not prevent the Supreme

> Court from remanding the case to the district court for the purpose of determining whether damages should be awarded. It is clear on the authority of *Atkinson*, therefore, that a prayer for *a prohibited injunction* does not preclude a district court from exercising original jurisdiction, at least if non-injunctive relief is also sought." (Emphasis added)

The underlined portions of the above quotation make it clear that the District Court was holding that under Norris-LaGuardia, as construed by this Court in *Sinclair*, the Federal Court had no jurisdiction, under any circumstances, to enjoin a peaceful strike in breach of contract and that the Petitioner, therefore, had sought "a prohibited injunction"—prohibited, that is, by Norris-LaGuardia and *Sinclair*. The District Court further held that under *Atkinson* v. *Sinclair Refining Co.* (1962), 370 U.S. 238, which was a companion case to *Sinclair*, the District Court had jurisdiction of the cause despite the fact that there was no power to grant the injunctive relief sought by the Petitioner. Accordingly, the District Court denied the Petitioner's motion to remand.

In a subsequent portion of its order of March 2, 1966, the District Court addressed itself to the Respondents' motion to dissolve the state court injunction then in effect. The Petitioner respectfully submits that it is the following paragraph of the order of March 2, 1966, which makes it clear that the District Court dissolved the state court injunction "because it felt that action was required by *Sinclair Refining Co.* v. *Atkinson*."[1] The District Judge, at the conclusion of his order, stated:

> "There remain to be considered defendants' motions to dissolve the injunction heretofore issued and to dis-

[1] Avco Corporation v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers, et al. (April 8, 1968) ... U.S. ...; ... L.E. 2d ...; 36 U.S. L. Week 4288, footnote 4.

> miss the action. *On the basis of the court's reasoning and the authorities cited in connection with the motion to remand, the court is of the opinion that the motion to dissolve the injunction is well taken and that the motion to dismiss the action is not well taken.*
>
> "*Accordingly*, it is Ordered that the motion to dismiss the action is denied, *and it is further Ordered that the injunction heretofore issued be, and it hereby is, dissolved.*" (A. 22; emphasis added)

It will be observed that in the foregoing paragraph, the District Judge explicitly stated that he was dissolving the state court injunction on the basis of "the authorities cited in connection with the motion to remand." As shown above, two of the "authorities cited in connection with the motion to remand" were "*Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962)" and "the Norris-LaGuardia Act." (A. 19). It is evident that these were the authorities to which the District Judge was referring, and which were the "basis" of his decision to dissolve the injunction, because they are the only authorities cited by him in connection with the motion to remand which could conceivably require dissolution of the injunction. The District Judge could not have been relying on the companion case of *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962) in dissolving the state court injunction because *Atkinson* itself did not involve a prayer for injunctive relief. Neither did any of the other cases cited by the District Court in its order of March 2nd, excepting *American Dredging Co.* v. *Local 25, Marine Div., Int'l Union of Operating Engineers* (CA 3; 1964) 338 F. 2d 837; cert. den. 380 U.S. 935 (1965), referred to by the Court in footnote 1 and expressly rejected by the District Court as an authority. (A. 18) It must necessarily follow, therefore, that when the District Court stated that it was dissolving the state court injunction "on the basis of * * * the authorities cited in connection with the motion to remand," the reference was to *Sinclair* and

Norris-LaGuardia. The words "on the basis of" and "accordingly," employed by the District Court in this portion of its order, make it clear that the court was dissolving the state court injunction "because it felt that action was required by *Sinclair Refining Co.* v. *Atkinson*." [2]

The validity of the above conclusion is supported by the fact that the motion to dissolve filed by the Respondents was based solely and specifically on Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104). In their motion, the Respondents claimed that under Section 4, the District Court was powerless to "issue" or "maintain" any injunction growing out of a labor dispute. The Respondents also claimed that the existing injunction issued by the Chancery Court of Tennessee was "illegal" under the provisions of Norris-LaGuardia. In its order of March 2nd, the District Court did not repudiate these grounds expressly relied on by the Respondents. Reading the order of March 2nd, together with the motion on which it was based, the conclusion that the District Court believed it was controlled in the action which it took by Norris-LaGuardia and *Sinclair* is inescapable.

2. It is respectfully submitted that the Court should not reserve decision on the scope and effect of *Sinclair* for an "appropriate future occasion," but should face and decide these important questions now in the instant case. Clearly, if the "scope" of *Sinclair* does not extend to state courts or removed cases, or if *Sinclair* no longer has "validity," this Petitioner has been the victim of prejudicial error through the rulings of the courts below which are the subject of this proceeding in the Supreme Court. The opinion of April 8th now surrounds *Sinclair* with a fog of uncertainty.

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[2] Avco Corporation v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers, et al. (April 8, 1968 ... U.S. ...; ... L.E. 2d ...; 36 U.S. L. Week 4288, footnote 4.

There is little likelihood that a petition to review a state court injunction will ever reach the Supreme Court through any route other than removal. In view of *Avco*, unions hereafter will always remove rather than appeal the state court injunction order. So long as *Sinclair* is the law the District Court will act as the District Court acted in the instant case, and the Court of Appeals will affirm as the Court of Appeals did in the instant case. It is of urgent importance to the parties to collective agreements which contain no-strike clauses to dissipate the present fog of uncertainty and resolve these important questions at the earliest possible moment. It is respectfully submitted that the instant case does, in fact, present an appropriate vehicle for such decision of the fundamental question which the Court has reserved and, indeed, on its facts, requires such decision.

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J. MACK SWIGERT, an attorney for the Petitioner in the above proceeding and a member of the Bar of this Court, hereby certifies that the above Petition for Rehearing is presented in good faith and not for delay.

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